

Decision \_\_\_\_\_

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of Pacific Gas and Electric Company  
(U 39 M) for Section 851 Approval of Agreements  
Allowing Access to Electric Distribution Facilities  
for the Installation and Maintenance of  
Telecommunications Equipment.

Application 00-12-026  
(Filed December 19, 2000)

**INTERIM OPINION APPROVING NINE OF  
THIRTEEN AGREEMENTS FOR THE LEASE OF PROPERTY  
OWNED BY PACIFIC GAS AND ELECTRIC COMPANY**

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## **I. Summary**

In Application (A.) 00-12-026, Pacific Gas and Electric Company (PG&E) requests authority under Pub. Util. Code § 851 to convert 13 license agreements into lease agreements.<sup>1</sup> The agreements establish terms and conditions for telecommunications carriers to install equipment on PG&E's utility poles and other electric distribution facilities.

Today's decision grants PG&E conditional authority under § 851 to convert nine of the 13 license agreements into lease agreements.<sup>2</sup> The remaining four agreements will be addressed in a future decision after further review of the agreements' compliance with § 851 and the California Environmental Quality Act.<sup>3</sup> Today's decision also requires PG&E to offer third parties the opportunity to install equipment on PG&E's facilities pursuant to license agreements that do not include any fees associated with § 851.

## **II. The Application**

The nine agreements that are the subject of today's decision were executed over a four-year period beginning in 1996. In each agreement, PG&E grants a license to a telecommunications carrier pursuant to General Order (G.O.) 69-C to

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<sup>1</sup> All statutory references are to the Public Utilities Code unless otherwise noted.

<sup>2</sup> The nine agreements addressed by today's decision are between PG&E and the following entities: (i) Advanced TelCom Group, Inc., (ii) Brooks Fiber Communications of Bakersfield, Inc., (iii) Brooks Fiber Communications of Fresno, Inc., (iv) Brooks Fiber Communications of San Jose, Inc., (v) Brooks Fiber Communications of Stockton, Inc., (vi) Fiber Communications, Inc., (vii) Sprint Communications Company L.P., (viii) RCN Telecom Services, Inc., and (ix) Seren Innovations, Inc.

<sup>3</sup> The four agreements that will be addressed in a future decision are between PG&E and the following entities: (i) the San Luis Coastal Unified School District, (ii) the Dublin Unified School District, (iii) Metropolitan Fiber Systems of California, Inc., and (iv) MCI Telecommunication Corp.

install telecommunications equipment on PG&E's electric distribution facilities. Each of the nine carriers has installed equipment pursuant to its license agreement. All nine carriers have certificates of public convenience and necessity (CPCNs) from the Commission to operate in California.

PG&E has authority under G.O. 69-C to grant licenses for the use of its facilities. Any license granted by PG&E pursuant to G.O. 69-C must be revocable at any time by PG&E, and must not interfere with PG&E's operations or services. PG&E states that the carriers choose to obtain licenses under G.O. 69-C in order to obtain immediate access to PG&E's facilities.

To provide the carriers with long-term, uninterrupted access to PG&E's facilities, the nine agreements, which PG&E refers to as "Master Agreements," require PG&E to file an application for authority under § 851 to convert the license agreements into lease agreements. The Master Agreements stipulate that the conversion of the Agreements into § 851 leases will not become effective until after the Commission approves the conversion. Any G.O. 69-C licenses granted by PG&E under the Master Agreements will terminate once the Agreements are converted into § 851 leases, and any equipment previously installed under G.O. 69-C will automatically become subject to the lease provisions in the Agreements. The duration of the Master Agreements as a license, lease, or combination of the two is five years, with a one-time renewal option for an additional five years.

The Master Agreements establish terms and conditions for installing the carriers' telecommunications equipment on PG&E's electric distribution facilities located anywhere in PG&E's service territory. Once a carrier has identified sites where it wishes to install equipment, PG&E will determine if the equipment can be installed safely and without harm to PG&E's electric distribution system. The

Agreements limit the installation of carriers' equipment to only those PG&E facilities that (1) have unused space, and (2) are located within PG&E's existing rights-of-way. The Agreements also provide that the carriers must install and maintain their equipment in accordance with all applicable laws and regulations, including G.O. 95 and G.O. 128.<sup>4</sup>

The Master Agreements allow PG&E to reclaim space used by a carrier if PG&E needs the space to provide utility service. If space is reclaimed, the Agreements require PG&E to make a good faith effort to provide alternate space by rearranging existing facilities or adding new facilities. If this is not possible, the carriers simply lose their space.

The Master Agreements require the carriers to reimburse PG&E for any costs incurred by PG&E associated with the carriers' installations. The Agreements also require the carriers to pay various fees to PG&E. For example, carriers must pay mapping and engineering fees, as well as a fee for each attachment.<sup>5</sup> The Master Agreements also require each carrier to pay a one-time fee of \$10,000 for PG&E to file an application at the Commission for authority under § 851 to convert the license agreements into lease agreements.<sup>6</sup> In addition, the Agreements require PG&E to request authority from the Commission for an unlimited number of installations under the Agreements without the need for additional filings. If the Commission denies the request, the

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<sup>4</sup> G.O. 95 specifies standards for the construction, maintenance, operation, and use of overhead electrical and communications facilities. G.O. 128 does the same for underground facilities.

<sup>5</sup> The Agreements define "attachment" as a single contact on a pole to accommodate or support a single cable or piece of equipment and, with respect to underground facilities, the installation of one cable within a conduit or inner duct.

<sup>6</sup> Master Agreements, Section 8.5.

carriers must pay \$5,000 for each subsequent filing. PG&E states that all fees will be credited “above the line” to electric ratepayers for general rate case purposes.

In A.00-12-026, PG&E requests authority to make the following “insubstantial amendments” to the Master Agreements without having to file a new application:

- Installations and removals of equipment that are made in accordance with the provisions of the Master Agreements.
- One-time renewals of Master Agreements that are made in accordance with Section 2.5 of the Agreements.
- Reductions in the duration of the Master Agreements.
- Revisions in the amount of the fees paid to PG&E that are made in accordance with (i) the Master Agreements, and (ii) the rules, regulations, or orders of the Commission or a court of law.
- Assignments of the Master Agreements.
- Other insubstantial amendments agreed to by the parties.

PG&E states that prior Commission approval of insubstantial amendments will avoid unnecessary expenditures of resources by the Commission, PG&E, and the carriers.

PG&E believes that it is unnecessary for the Commission to conduct an environmental review of the Master Agreements. This is because each of the nine carriers that are parties to the Agreements obtained its CPCN in a proceeding where the Commission adopted a mitigated negative declaration regarding the activities authorized by the carrier’s CPCN. PG&E states the mitigated negative declarations encompass the types of activities that will occur under the Master Agreements, since the Agreements are specifically limited to activities that (1) are covered by the carriers’ CPCNs, and (2) conform with all applicable laws, including Commission orders.

PG&E offers several reasons why it is in the public interest for the Commission to authorize the conversion of the Master Agreements into § 851 leases. First, the Agreements are consistent with the Commission's policy of favoring the use of existing utility facilities for the development of telecommunications infrastructure. Second, the Agreements are structured to prevent the carriers' use of PG&E's facilities from interfering with PG&E's electric operations or public utility services. Third, the Agreements benefit the carriers by enabling them to expand and improve their service using existing utility facilities. Fourth, the fees paid by the carriers will benefit PG&E's electric ratepayers. Fifth, the Agreements are consistent with Commission rules governing access to utility rights-of-way (ROW) by telecommunication companies that were adopted in Decision (D.) 98-10-058, as modified by D.00-03-055 (ROW decisions). Finally, the Agreements will not have an adverse effect on the environment, since any installation of equipment by a carrier must comply with the carrier's mitigated negative declaration.

### **III. Protest and Response**

A protest to A.00-12-026 was jointly filed by AT&T Communication of California, Inc., XO California, Inc., and the California Cable Television Association (collectively, "Protestants"). The Protestants argue that it is improper for PG&E to seek Commission approval of the Master Agreements pursuant to § 851. Section 851 states, in relevant part, as follows:

No public utility...shall...lease...any part of its...plant, system or other property **necessary or useful** in the performance of its duties to the public...without first having secured from the commission an order authorizing it to do so. (Emphasis added.)

The Protestants contend that § 851 does not apply to the Master Agreements, since the Agreements do not allow the carriers to install equipment in space that is necessary or useful to PG&E.

The Protestants next argue that the Master Agreements are licenses that are subject to G.O. 69-C, and that such licenses do not require Commission approval under § 851. G.O. 69-C states, in relevant part, as follows:

[P]ublic utilities...are...authorized to grant...licenses...for use [of their property]...**without further special authorization by this Commission** whenever it shall appear that the exercise of such...license...will not interfere with the operations...of such public utilities...provided, however, that **each such grant...shall be made conditional on the right of the grantor...to commence or resume use of the property in question whenever, in the interest of its service to its patrons or consumers, it shall appear necessary or desirable to do so.** (Emphasis added.)

The Protestants assert that there are two key criteria for determining when an agreement is a license that is subject to G.O. 69-C. First, the agreement must be limited to the use of utility property that is not necessary or useful in the performance of the utility's duties to the public. The Protestants believe that the Master Agreements satisfy this criterion for the reasons stated in the previous paragraph. Second, the utility must be able to terminate the agreement at any time. The Protestants contend that the Master Agreements satisfy this criterion because Sections 7.1 and 7.3 of the Agreements allow PG&E to terminate the Agreements at any time. The Protestants also contend that the Master Agreements are licenses because of their similarity to G.O. 69-C license agreements in Advice Letter (AL) 2063-E that PG&E filed at the Commission on December 20, 2000.

The Protestants argue that the Master Agreements contain unreasonable fees, including (1) a one-time charge of \$10,000 to file A.00-12-026, (2) a \$5,000 fee for each additional filing, and (3) attachment, engineering, and rearrangement fees that exceed PG&E's costs in contravention of the ROW decisions. The Protestants believe that PG&E's motive for filing A.00-12-026 is to have the Commission ratify the unreasonable fees. The Protestants are concerned that PG&E's attempt to extract unreasonable fees will, if approved, encourage PG&E and other utilities to extract unreasonable fees in the future.

The Protestants note that PG&E has an affiliate engaged in telecommunications-related activities.<sup>7</sup> The Protestants contend that PG&E is attempting to hinder the affiliate's competitors by making the competitors' access to PG&E's facilities more difficult and expensive. The Protestants also that granting A.00-12-026 would create a precedent that allows "incumbent pole owners" to attach equipment to their poles without any Commission review, while competitors must incur the costs and delays associated with § 851. The Protestants argue that such a result would violate the Telecommunications Act of 1996 by imposing requirements that are not competitively neutral.

PG&E denies the Protestants' accusation that it is attempting to make access to its facilities more difficult and expensive. PG&E also disputes the Protestants' claim that the Master Agreements are G.O. 69-C licenses because PG&E can terminate the Agreements at anytime. PG&E states that Article X of the Agreements provides that once the Commission has approved the Agreements as § 851 leases, PG&E may terminate the Agreements only under the

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<sup>7</sup> In AL 2276-G/2054-G, dated November 14, 2000, PG&E notified the Commission that it had created an affiliate called PG&E Telecom, LLC.

following circumstances: (1) material breach; (2) failure of a carrier to maintain its CPCN; (3) assignment without consent; (4) failure of the attaching carrier to obtain permission from underlying land owners, which results in legal proceedings; and (5) written mutual agreement.

#### **IV. Discussion**

##### **A. License vs. Lease**

A threshold issue is whether the conversion of the Master Agreements into "leases" creates genuine lease agreements. If it does, then the conversion is subject to Commission review and approval under § 851. Conversely, if the conversion does not alter the Master Agreements' current status as G.O. 69-C licenses as argued by the Protestants, then the conversion may proceed without Commission review and approval.<sup>8</sup>

To resolve the threshold issue, we will rely on the definitions of "license" and "lease" traditionally used by the courts. In general, the courts define a "license" as an agreement that confers a revocable right to use an asset, while a "lease" is an agreement that confers exclusive possession of an asset for a stated period of time. The courts have also held that the intention to establish a lease must be evidenced by an agreement.<sup>9</sup> Our approach to resolving the threshold issue is based on the unique facts and issues before us in this proceeding. If a matter similar to the threshold issue arises in another proceeding, it may be necessary, depending on circumstances, to consider additional factors in resolving the matter.

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<sup>8</sup> D.96-04-045, 65 CPUC 2d 324, 328, and 331.

<sup>9</sup> Von Goerlitz v. Turner, 1944 Cal. App. LEXIS 725, \*\*\*5.

Applying the previously described definitions, we find that the conversion of the Master Agreements into "leases" creates genuine lease agreements. First, the converted Master Agreements provide the carriers with an exclusive right to use those portions of PG&E's facilities on which the carriers install their equipment unless PG&E later needs a particular facility for the provision of utility service. Such a right is closer to a lease than a license. Second, the Master Agreements express the clear intent to establish leases. Third, the Agreements include provisions that are common to leases, such as a specified term, a description of the leased property, and the amount of the lease payments.<sup>10</sup> Finally, the Master Agreements, once they are converted into leases, will not be revocable at any time as is the case with license agreements. The lack of revocability is evident from Article X of the Master Agreements, which provides that once the Agreements have been converted into leases, PG&E can terminate the Agreements only under specified circumstances, such as a material breach or a failure by a carrier to maintain its CPCN.<sup>11</sup>

We disagree with the Protestants' assertion that the converted Master Agreements are licenses because Section 7.1 allows PG&E to revoke the Agreements at any time. Section 7.1 states that a carrier must remove its

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<sup>10</sup> A lease must include (i) a description of the leased property, (ii) an agreed term, and (iii) an agreed rental to be paid at particular times during the specified term. ([Losson v. Blodgett](#), 1934 Cal. App. LEXIS 1222, \*\*\*6.)

<sup>11</sup> Article X, Sections 10.1(a), 10.1(b)(1), 10.1(b)(2), and 10.1(b)(3). Section 10.1(b)(4) states that the Master Agreement may be terminated in accordance with Section 2.1 if PG&E or the Commission invokes G.O. 69-C. Section 2.1, in turn, grants a license to install equipment on PG&E's facilities until the Commission approves the conversion of the license into a lease. Once the conversion is complete, the license is terminated, and Section 2.1 no longer applies. Once Section 2.1 becomes inapplicable, Section 10.1(b)(4) also becomes inapplicable.

equipment from a PG&E facility whenever PG&E terminates its use of the facility. However, Section 7.1 applies only to a carrier's use of individual facilities, not an entire Master Agreement. Thus, Section 7.1 does not allow PG&E to revoke a Master Agreement. Moreover, Section 7.1 allows the carrier to purchase a particular facility that is no longer used by PG&E. The carrier's right to purchase a facility on which its equipment is installed is closer to a lease, which confers possession of an asset, than it is to a license, which confers a revocable right to use an asset.

We also disagree with the Protestants' assertion that the Master Agreements are licenses because Section 7.3 allows PG&E to terminate the Agreements at any time. Section 7.3 states that a carrier must remove its equipment from those PG&E facilities that PG&E needs for its own use. However, there is nothing in Section 7.3 that pertains to the termination of the Master Agreements. The provisions governing the termination of the Agreements are contained in Article X, which is totally separate from Section 7.3. Moreover, if PG&E does reclaim facilities from a carrier, Section 7.3 requires PG&E to provide alternate facilities, if possible. In our view, PG&E's obligation to provide alternate facilities is closer to a lease, which confers possession of an asset, than it is to a license, which confers a revocable right to use an asset.

Even if Section 7.3 did govern the termination of the Master Agreements, which it does not, we would still disagree with the Protestants' assertion that Section 7.3 allows PG&E to terminate the Agreements at any time. This is because Section 7.3 requires PG&E to give at least 90 days' notice prior to removal, except there may be less notice in an emergency. We find that the requirement to provide 90 days' notice is far closer to a lease than a license.

In their comments on the draft decision, the Protestants argue that because Section 7.3 provides for 90 day's notice before and after the conversion of the licenses into "leases," this provision cannot be used as justification for finding that the Master Agreements are leases. The Protestants have misread today's decision. Today's decision does not find that the Master Agreements are leases because of the provision for 90-day's notice in Section 7.3. Rather, the decision finds that the Protestants are incorrect when they assert that Section 7.3 demonstrates that the Agreements are G.O. 69-C licenses. Moreover, the Protestants might not realize that so long as the Master Agreements are G.O. 69-C licenses, PG&E may terminate the Agreements "whenever it shall appear necessary or desirable to do so," regardless of the provision for 90-day's notice in Section 7.3. Conversely, once the Agreements are converted into § 851 leases, G.O. 69-C no longer applies, and PG&E may terminate the Agreements only in accordance with Article X of the Agreements.

Finally, we disagree with the Protestants' assertion that the Master Agreements should be deemed license agreements because the Agreements are similar to the license agreements filed at the Commission by PG&E in AL 2063-E. As described previously, the Master Agreements, once they are converted into leases, will not be revocable at any time. In contrast, the license agreements in AL 2063-E may be terminated at any time in accordance with G.O. 69-C.

#### **B. Public Utilities Code § 851**

Having determined that the conversion of the Master Agreements into "leases" creates genuine lease agreements, we next consider if the conversion is subject to § 851. Section 851 provides that no public utility shall lease property that is necessary or useful in the performance of its duties to the public without prior authority from the Commission. The property that is subject to the Master

Agreements is currently being used by PG&E to provide electric power to the public. Therefore, the property is useful, and the conversion of the Master Agreements into leases is subject to § 851.

The standard for determining whether a lease should be authorized pursuant to § 851 is whether the lease is in the public interest.<sup>12</sup> If necessary, the Commission may withhold authority for a lease or attach conditions to a lease in order to protect and promote the public interest.<sup>13</sup>

We find that the conversion of the Master Agreements into leases is in the public interest and should be approved. We have repeatedly held that the public interest is served when, as is the case here, utility property is used for other productive purposes.<sup>14</sup> As we stated in D.00-07-010:

It is sensible for...energy utilities, with their extensive easements, rights-of-way, and cable facilities, to cooperate...with telecommunications utilities...Joint use of utility facilities has obvious economic and environmental benefits. The public interest is served when utility property is used for other productive purposes without interfering with the utility's operation or affecting service to utility customers. (D.00-07-010, *mimeo*, p. 6.)

Another public benefit of the Master Agreements is that the revenues from the Agreements will flow to PG&E's electric ratepayers. Over the long run, these

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<sup>12</sup> D.01-10-001, 2001 Cal. PUC LEXIS 932, \*16; and D.01-10-002, 2001 Cal. PUC LEXIS 946, \*14.

<sup>13</sup> D.01-06-007, Fn. 41, 2001 Cal. PUC LEXIS 390, \*25.

<sup>14</sup> D.00-06-057, *mimeo.*, p. 7; D.00-06-056, *mimeo.*, p. 7; D.00-02-041, *mimeo.*, p. 10; D.99-04-066, *mimeo.*, p. 5; D.99-03-016, *mimeo.*, p. 14; D.99-02-036, *mimeo.*, pp. 6-7; D.99-02-035, 1999 Cal. PUC LEXIS 40 \*11; and D.93-04-019, 48 CPUC 2d 601, 603.

revenues will provide a relatively small but nonetheless welcome offset to the recent rate hikes brought about by the California electricity crisis.

We find nothing in the Master Agreements that will harm the public interest. The Agreements require the carriers to install and maintain their equipment in accordance with all applicable laws, regulations, and safety requirements, including G.O. 95 and G.O. 128.<sup>15</sup> The Agreements also provide PG&E with ample ability to operate its electric distribution system in a safe and reliable manner. In addition, the Agreements provide PG&E with the right to reclaim any facility that PG&E may need for utility operations. Furthermore, the Master Agreements will not have an adverse impact on the environment for the reasons stated later in this decision. Finally, we have authorized the lease of utility property many times in the past,<sup>16</sup> and we are not aware of any harm to the public interest that has occurred as a result of these leases. Given our experience, we have no reason to suspect that the proposed leases before us in this proceeding will prove detrimental to the public interest.

To avoid the unnecessary expenditure of resources by the Commission and PG&E, we grant PG&E's request to make the following minor amendments to the Master Agreements without additional approval from the Commission:

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<sup>15</sup> Master Agreements, Section 4.1.

<sup>16</sup> See, for example, D.00-01-014, D.00-07-010, D.00-06-057, D.00-06-056, D.00-02-041, D.99-09-070, D.99-04-066, D.99-03-020, D.99-03-016, D.99-02-061, D.99-02-036, D.99-02-035, D.98-07-015, D.98-07-006, D.98-02-110, and D.96-12-024.

- Installations and removals of carriers' equipment that are made in accordance with the Master Agreements.
- One-time renewals of Master Agreements that are made in accordance with Section 2.5 of the Agreements.
- Reductions in the duration of the Master Agreements.
- Revisions in the amount of the fees paid to PG&E that are made in accordance with (i) the applicable Master Agreement, and (ii) the rules, regulations, or orders of the Commission or a court of law.

As we have done in previous decisions,<sup>17</sup> we will require PG&E to notify our Energy Division about (1) any reduction or extension of the term of a Master Agreement, (2) the termination of a Master Agreement, and (3) substantive changes to plant-in-service or rights-of-way under any of the Master Agreements. All notifications should be in writing, include a description of the sites involved, and be provided within 30 days of the event triggering the notice.

We decline to grant PG&E's request for authority to make "other insubstantial amendments" to the Master Agreements without prior approval from the Commission. PG&E did not offer any criteria for determining what constitutes an "other insubstantial amendment." Without more information, we conclude that it is imprudent to grant PG&E's request.

We also decline to grant PG&E's request for authority to assign the Master Agreements without prior approval from the Commission. The Master Agreements confer rights and obligations that substantially affect the ability of PG&E and the carriers to serve the public. Consequently, we have a duty under § 851 to review and approve each assignment in order to ensure that the assignment is in the public interest.

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<sup>17</sup> See, for example, D.96-10-071 and D.02-03-059.

We are not persuaded by the Protestants' argument that § 851 does not apply to the Master Agreements because the Agreements only allow the carriers to use space on PG&E's facilities that is not necessary or useful in the performance of PG&E's duties to the public. When an asset is in rate base, as is the case here, the entire asset is devoted to the provision of service to the public. The plain language of § 851 compels the conclusion that parts of the asset may not be encumbered or disposed of without our prior approval.<sup>18</sup>

In their comments on the draft decision, the Protestants argue that the decision violates § 767.5(b) by finding that § 851 applies to the lease of surplus space. Section 767.5(b) states as follows:

The Legislature finds and declares that public utilities have dedicated a portion of such support structures to **cable television corporations** for pole attachments in that public utilities have made available, through a course of conduct covering many years, surplus space and excess capacity on and in their support structures for use by cable television corporations for pole attachments, and that the provision by such public utilities of surplus space and excess capacity for such pole attachments is a public utility service delivered by public utilities to cable television corporations. The Legislature further finds and declares that it is in the interests of the people of California for public utilities to continue to make available such surplus space and excess capacity for use by **cable television corporations**. (Emphasis added.)

The plain language of § 7.67.5(b) indicates that the statute applies only to the use of utility facilities by cable television corporations. Consequently, § 767.5(b) does not apply to the Master Agreements because none of the Agreements involves a

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<sup>18</sup> D.92-07-007, 45 CPUC 2d 24, 29.

cable television corporation. But even if § 767.5(b) did apply, today's decision is consistent with the statute, since the decision grants PG&E's request to lease space on its facilities.

We disagree with the Protestants' assertion that the Master Agreements require the carriers to pay unreasonable fees. If this were the case, presumably at least one of the carriers would have said so in this proceeding, but none did.<sup>19</sup> Furthermore, the Protestants did not present any information to support their assertion that the fees violate our ROW decisions. Since none of the carriers objected to the fees, we decline to conclude based on the record before us that the fees are unreasonable. In any event, in the following paragraph we require PG&E to take certain actions that should allay the Protestants' concern about unreasonable fees.

In their comments on the draft decision, the Protestants claim that PG&E requires all carriers that seek to attach equipment to PG&E's facilities to sign lease agreements like those before us in this proceeding.<sup>20</sup> We are troubled that PG&E might require all carriers to sign lease agreements when some carriers might only want license agreements. Therefore, we will require PG&E to offer access to its facilities under G.O. 69-C license agreements like those contained in AL 2063-E. Those license agreements do not require carriers to pay any fees associated with § 851,<sup>21</sup> and we will require PG&E to continue this practice.

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<sup>19</sup> All carriers that are parties to the Master Agreements received a copy of A.00-12-026. (A.00-12-026, p. 17)

<sup>20</sup> Protestants' comments on the draft decision, pp. 9 - 10.

<sup>21</sup> Section 8.5 of the Master Agreements requires each carrier to pay an initial fee of \$10,000 to reimburse PG&E for its costs to file a § 851 application, and a fee of \$5,000 for each additional

*Footnote continued on next page.*

The Protestants also claim in their comments on the draft decision that the decision violates § 709. In § 709 the Legislature declares that it is the policy of California to encourage the rapid deployment of advanced telecommunications services and technologies "through appropriate regulatory changes at the federal, state and local levels." The Protestants contend that the decision thwarts § 709 by implementing regulatory changes that add significant cost and delay to the deployment of advanced telecommunications services and technologies. We disagree. Today's decision does not implement regulatory changes. Rather, it addresses a routine application for approval of lease agreements pursuant to § 851. In addition, today's decision does not hinder the deployment of advanced services and technologies. All of the carriers that are parties to the Master Agreements have already attached equipment to PG&E's facilities pursuant to the Agreements, and may continue to do so pursuant to today's decision.

Finally, we are not persuaded by the Protestants' argument that today's decision undermines competition by allowing "incumbent pole owners" such as PG&E to attach equipment to their poles without any Commission review, while competitors must incur the costs and delays associated with § 851.<sup>22</sup> Competitors can avoid the costs and delays associated with § 851 by installing their equipment under revocable licenses pursuant to G.O. 69-C.<sup>23</sup> If competitors desire § 851 leases, it is reasonable for competitors to pay for the

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submission related to § 851. There are no similar fees in the G.O. 69-C license agreements contained in AL 2063-E.

<sup>22</sup> Although the Protestants assert that PG&E is attempting to hinder the competitors of PG&E's affiliate engaged in the provision of telecommunications services, the Protestants provided no evidence that PG&E has treated its affiliate any differently than the affiliate's competitors.

<sup>23</sup> The Commission does not review G.O. 69-C license agreements.

costs that utilities incur to comply with § 851.<sup>24</sup> Furthermore, even though the Commission must approve § 851 leases, there is no reason why the approval process should delay the installation of competitors' equipment. As the Master Agreements demonstrate, competitors can install their equipment under G.O. 69-C license agreements pending the Commission's review and approval of § 851 leases.

### **C. California Environmental Quality Act**

The Commission has an obligation under the California Environmental Quality Act (CEQA) to consider the environmental consequences of PG&E's request for authority under § 851 to convert the Master Agreements into lease agreements.<sup>25</sup> The Commission previously considered the environmental consequences of the activities contemplated by the Master Agreements in the decisions where the Commission granted CPCNs to the carriers that are parties to the Agreements. In those decisions, the Commission adopted mitigated negative declarations that are applicable to the activities that will occur under the Master Agreements.<sup>26</sup> Consequently, there is no need to conduct further environmental review of the Master Agreements.

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<sup>24</sup> In future applications where PG&E seeks Commission approval of agreements that impose fees on third parties for the costs that PG&E incurs to comply with § 851, PG&E should demonstrate that the fees and associated costs are reasonable.

<sup>25</sup> Public Resources Code § 21080. See also D.02-03-022, D.02-02-041, and D.02-01-058.

<sup>26</sup> Section 1.4 of the Master Agreements states that the Agreements apply only to activities that are covered by the carriers' CPCNs. Each carrier is required by its CPCN to comply with the mitigated negative declaration associated with the CPCN. (See D.95-12-057 (granting CPCNs to Brooks Fiber of Fresno, Brooks Fiber of San Jose, Brooks Fiber of Stockton, and Brooks Fiber of Bakersfield); D.97-08-045 (granting CPCN to Sprint); D.98-09-066 (granting CPCNs to RCN Telecom and Fiber Communications); D.98-12-083 (granting CPCN to Advanced Telecom Group); and D.99-06-083 (granting CPCN to Seren Innovations)).

Although we find there is no need to conduct further environmental review, we will nonetheless condition our approval of the leases on the carriers' compliance with (1) all environmental rules and regulations applicable to the equipment installed by the carriers on PG&E's facilities pursuant to the approved leases, and (2) any environmental regulations that the Commission may adopt in Rulemaking (R.) 00-02-003 to the extent these new regulations pertain to the carriers' equipment installed pursuant to the leases.<sup>27</sup>

#### **D. Compliance with § 851 and CEQA**

We have expressed concern in recent decisions that utilities might instigate transactions and activities under G.O. 69-C in order to evade the advance review and approval requirements of § 851 and CEQA.<sup>28</sup> We have carefully reviewed the Master Agreements, and find that the Agreements do not circumvent § 851. This is because the Agreements properly grant G.O. 69-C licenses for the use of PG&E's facilities, and the conversion of the licenses into leases, which is subject to § 851, does not become effective until after the Commission has reviewed and approved the conversion. We also find that the Master Agreements do not circumvent CEQA. As described earlier, the Commission previously conducted a CEQA review of the activities contemplated by the Master Agreements and adopted mitigated negative declarations applicable to these activities.

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<sup>27</sup> The Commission is considering in R.00-02-003 whether to revise its practices and policies for implementing CEQA with respect to telecommunications carriers. (R.00-02-003, Ordering Paragraph 1)

<sup>28</sup> D.01-12-023, *mimeo.*, p. 2; D.01-12-022, *mimeo.*, p. 2; D.01-11-063, *mimeo.*, p. 6; D.01-06-059, *mimeo.*, pp. 7–8; D.01-03-064, *mimeo.*, pp. 7–12; and D.00-12-006, *mimeo.*, pp. 6–7.

We remain concerned that utilities might attempt to use G.O. 69-C to circumvent § 851 and CEQA. We caution utilities that any use of G.O. 69-C to evade § 851 and CEQA will be subject to monetary penalties and other sanctions.

## **V. Procedural Matters**

In Resolution ALJ 176-3053, dated December 21, 2000, the Commission preliminarily determined that this proceeding should be categorized as ratesetting, and that hearings were not necessary. PG&E and the Protestants subsequently filed written statements in which they declared that hearings were not necessary. Based on the record in this proceeding, we affirm and finalize the preliminary determinations contained in Resolution ALJ 176-3053.

Public Utilities Code § 311(g)(1) requires the draft decision to be (i) served on all parties, and (ii) subject to at least 30 days of public review and comment prior to a vote of the Commission. The draft decision of Administrative Law Judge Kenney was mailed on December 24, 2001, pursuant to § 311(g)(1) and Rule 77.7. PG&E and the Protestants filed comments regarding the draft decision on January 14, 2002. There were no reply comments. These comments have been reflected, as appropriate, in the final decision adopted by the Commission.

## **Findings of Fact**

1. In each of the nine Master Agreements addressed by this decision, PG&E grants a license to a telecommunications carrier pursuant to G.O. 69-C to install telecommunications equipment on PG&E's electric distribution facilities. Each carrier has (i) a CPCN to operate in California, and (ii) installed equipment on PG&E's facilities pursuant to its G.O. 69-C license.

2. Each Master Agreement requires PG&E to file an application for authority under § 851 to convert the Agreement from a G.O. 69-C license into a § 851 lease. Each Agreement states that the conversion will not become effective until the Commission approves it.

3. All license-related provisions in the Master Agreements terminate once the Agreements are converted into § 851 leases. All installations by the carriers that were made pursuant to the G.O. 69-C license provisions in the Agreements automatically become subject to the lease provisions in the Agreements after the Agreements are converted into § 851 leases.

4. The duration of the Master Agreements is five years, with a one-time renewal option for an additional five years.

5. The Master Agreements state that PG&E will determine if the carriers' equipment can be installed safely and without adversely affecting PG&E's electric distribution system. The Agreements limit the carriers' equipment to those PG&E facilities that (i) have unused space, and (ii) are located within utility rights-of-way. The Master Agreements allow PG&E to reclaim space from a carrier if PG&E needs the space to provide utility service.

6. The Master Agreements require carriers to reimburse PG&E for any costs it incurs in connection with the carriers' installations.

7. Each Master Agreement requires the carrier to pay various fees to PG&E, including: (i) mapping and engineering fees, (ii) attachment fees, (iii) a one-time fee of \$10,000 for PG&E to file an application at the Commission for authority under § 851 to convert the license agreement into a lease agreement, and (iv) a fee of \$5,000 for each subsequent filing at the Commission related to § 851.

8. PG&E represents that all fees it receives under the Master Agreements will be credited to electric ratepayers for general rate case purposes.

9. Each carrier that is a party to the Agreements obtained its CPCN in a proceeding where the Commission adopted a mitigated negative declaration regarding the activities authorized by the carrier's CPCN. Each carrier is required by its CPCN to comply with its mitigated negative declaration.

10. The Master Agreements provide that carriers may install their equipment on PG&E's facilities only to the extent the installations are consistent with the activities authorized by the carriers' CPCNs.

11. The Master Agreements require carriers to install and maintain their equipment in conformity with all applicable laws, rules, and regulations.

12. The Master Agreements are structured to prevent the carriers' use of PG&E's facilities from interfering with PG&E's operations or adversely affecting service to PG&E's customers.

13. The Protestants assert that the Master Agreements are licenses because Sections 7.1 and 7.3 of the Agreements allow PG&E to terminate the Agreements at any time.

14. In previous decisions the Commission required PG&E to notify the Energy Division about (i) any reduction or extension of the term of a master agreement, (ii) the termination of a master agreement, and (iii) substantive changes to plant-in-service or rights-of-way under any of the master agreements.

15. The Protestants assert that today's decision violates § 767.5(b) by finding that § 851 applies to the lease of surplus space.

16. There is no evidence that (i) any carrier that is a party to the Master Agreements believes the Agreements impose unreasonable fees, or (ii) the Master Agreements establish fees that violate the Commission's ROW decisions.

17. The Protestants assert that today's decision violates § 709 by implementing regulatory changes that add significant cost and delay to the deployment of advanced telecommunications services and technologies.

18. Today's decision does not implement regulatory changes; it addresses a routine application for approval of lease agreements pursuant to § 851.

19. Today's decision does not hinder the deployment of advanced services and technologies. All of the carriers that are parties to the Master Agreements have already attached equipment to PG&E's facilities pursuant to the Agreements, and may continue to do so pursuant to today's decision.

20. The Protestants assert that PG&E requires any carrier that seeks to attach its equipment to PG&E's facilities to sign a lease agreement that requires the carrier to pay the following fees: (i) a one-time fee of \$10,000 for PG&E to file an application at the Commission to obtain authority for the lease under § 851, and (ii) a fee of \$5,000 for each subsequent filing at the Commission related to § 851.

21. Advice Letter 2063-E filed by PG&E on December 20, 2000, contains three G.O. 69-C license agreements. Each of these agreements allows a carrier to attach its equipment to PG&E's facilities; none of these agreements requires the licensee to pay any fees associated with § 851.

22. The Protestants argue that today's decision violates the Telecommunications Act of 1996 by establishing a precedent that allows "incumbent pole owners" to attach equipment to their poles without any Commission review, while competitors must incur the costs and delays associated with § 851.

23. The Commission has expressed concern in recent decisions that utilities might use G.O. 69-C to circumvent the advance review and approval requirements of § 851 and CEQA.

## Conclusions of Law

1. In general, a license confers a revocable right to use an asset, while a lease confers exclusive possession of an asset for a stipulated period of time. The intention to establish a lease must also be evidenced by an agreement.

2. G.O. 69-C provides utilities with authority to grant licenses for the use of their facilities. A utility may terminate a license granted pursuant to G.O. 69-C whenever it appears necessary or desirable to do so.

3. After the Master Agreements are converted into "leases," the Agreements will be genuine leases because: (i) each Agreement provides a carrier with an exclusive right to use those portions of PG&E's property on which the carrier's equipment is installed unless PG&E needs the property for the provision of utility service, in which case PG&E must make a good faith effort to provide alternate sites for the carrier; (ii) each Agreement expresses a clear intent by the parties to establish a lease; (iii) the Agreements include provisions that are common to leases, such as a specified term, a description of the leased property, and the amount of the lease payments; and (iv) PG&E does not have the right to unilaterally terminate the Agreements at any time.

4. Section 7.1 of the Master Agreements states that a carrier must remove its equipment from a PG&E facility whenever PG&E terminates its use of the facility. This section applies only to a carrier's use of individual facilities, not an entire Master Agreement. Thus, Section 7.1 does not enable PG&E to revoke the Master Agreements at any time.

5. Section 7.1 allows the carrier to purchase a particular facility that is no longer used by PG&E. The carrier's right to purchase a facility on which its equipment is installed is closer to a lease, which confers possession of an asset, than it is to a license, which confers a revocable right to use an asset.

6. If PG&E does reclaim facilities from a carrier, Section 7.3 requires PG&E to provide alternate facilities, if possible. PG&E's obligation to provide alternate facilities is closer to a lease, which confers possession of an asset, than it is to a license, which confers a revocable right to use an asset.

7. Section 7.3 of the Master Agreements allows PG&E to reclaim space from a carrier after providing 90 days' notice. The requirement to provide 90 days' notice is closer to a lease, which confers possession of an asset, than it is to a license, which confers a revocable right to use an asset.

8. There is nothing in Sections 7.1 or 7.3 that pertains to the termination of the Master Agreements. The provisions governing the termination of the Agreements are in Article X, which is totally separate from Sections 7.1 and 7.3.

9. Article X of the Master Agreements provides that once the Commission has approved the Agreements as § 851 leases, PG&E may terminate the Agreements only under the following circumstances: (i) material breach; (ii) failure to maintain a CPCN; (iii) assignment without consent; (iv) failure of the attaching carrier to obtain permission from underlying land owners, which results in legal proceedings; and (v) written mutual agreement.

10. So long as the Master Agreements remain G.O. 69-C licenses, PG&E may terminate the Agreements in accordance with G.O. 69-C, i.e., whenever it is necessary or desirable to do so. Conversely, once the Agreements are converted into § 851 leases, G.O. 69-C no longer applies, and PG&E may terminate the Agreements only in accordance with Article X of the Agreements.

11. The Protestants are incorrect in their assertion that the Master Agreements are licenses because, in part, the Agreements are similar to the G.O. 69-C license agreements that PG&E filed in AL 2063-E. PG&E can terminate the G.O. 69-C license agreements contained in AL 2063-E whenever it is

necessary or desirable to do so. In contrast, after the Master Agreements have been converted into leases, PG&E can terminate the Agreements only in accordance with Article X of the Agreements.

12. Pub. Util. Code § 851 provides that no public utility shall lease property that is necessary or useful in the performance of its duties to the public without first having secured from the Commission an order authorizing it to do so.

13. The conversion of the Master Agreements into leases is subject to § 851, since the facilities that are subject to the Master Agreements are used by PG&E to provide service to the public. This is true even though the Master Agreements limit the space that carriers may lease on PG&E's facilities to that which is not used by PG&E. When an asset is in rate base, as is the case here, it is devoted in its entirety to the provision of service to ratepayers, and the plain language of § 851 compels the conclusion that parts of the asset may not be disposed of without prior Commission approval.

14. The standard for determining whether the conversion of the Master Agreements into leases should be authorized pursuant to § 851 is whether the conversion is in the public interest. The Commission may withhold authority for the conversion or attach conditions to the conversion in order to protect and promote the public interest.

15. The conversion of the Master Agreements into leases is in the public interest because: (i) the Agreements provide economic and environmental benefits by allowing carriers to use PG&E's extensive easements, rights-of-way, and electric distributions facilities to build and expand their telecommunications networks; and (ii) revenues from the Agreements will flow to PG&E's ratepayers.

16. The conversion of the Master Agreements into leases will not harm the public interest because: (i) the Agreements require the carriers to install and

maintain their equipment on PG&E's facilities in accordance with all applicable laws, regulations, and safety requirements; (ii) the Agreements will not adversely affect PG&E's operations or public utility services; (iii) the Agreements provide PG&E with the right to reclaim any leased facility that it may need for utility operations; (iv) the leases will not have an adverse impact on the environment; and (v) the Commission has authorized similar leases many times in the past, and based on this experience there is no reason to expect that the Master Agreements will prove detrimental to the public interest.

17. The conversion of the Master Agreements into leases should be authorized pursuant to § 851.

18. PG&E should be authorized to make the following minor amendments to the Master Agreements:

- a. Installations and removals of carriers' equipment that are made in accordance with the Master Agreements.
- b. One-time renewals of Master Agreements that are made in accordance with Section 2.5 of the Agreements.
- c. Reductions in the duration of the Master Agreements.
- d. Revisions in the amount of the fees paid to PG&E that are made in accordance with (i) the applicable Master Agreement, and (ii) the rules, regulations, or orders of the Commission or a court of law.

19. PG&E's request for authority to make "other insubstantial amendments" to the Master Agreements without prior Commission approval should be denied. PG&E did not offer any criteria for determining what constitutes an insubstantial amendment. Without such criteria, it is imprudent to grant PG&E's request.

20. PG&E's request for authority to assign the Master Agreements without prior Commission approval should be denied. Because the Agreements confer rights and obligations that substantially affect the ability of PG&E and the

carriers to serve the public, the Commission has a duty under § 851 to review and approve any assignment to ensure that it is in the public interest.

21. PG&E should notify the Director of the Commission's Energy Division of the following matters: (i) a reduction or extension of the term of any Master Agreement, (ii) the termination of any Master Agreement, and (iii) substantive changes to plant-in-service or rights-of-way under any of the Master Agreements. All notifications should be in writing, include a description of the sites involved, and be provided within 30 days of the event triggering the notice.

22. PG&E should allow third parties to attach telecommunications equipment to PG&E's facilities pursuant to G.O. 69-C license agreements like those contained in AL 2063-E. Any such agreements should not include fees associated with § 851, including the following fees set forth in Section 8.5 of the Master Agreements: (i) a one-time charge of \$10,000 to file a § 851 application at the Commission, and (ii) a fee of \$5,000 for each additional submission to the Commission related to § 851.

23. In future applications where PG&E seeks Commission approval of agreements that impose fees on third parties for the costs that PG&E incurs to comply with § 851, PG&E should demonstrate that the fees and associated costs are reasonable.

24. Public Utilities Code § 767.5(b) applies only to the use of utility facilities by cable television corporations. Since none of the Master Agreements involves a cable television corporation, § 767.5(b) does not apply to the Agreements.

25. Today's decision does not violates § 709.

26. Today's decision does not harm competition by forcing competitors that seek to install equipment on PG&E's facilities to incur the costs and delays

associated with § 851. Competitors can avoid the costs and delays associated with § 851 by installing their equipment pursuant to G.O. 69-C.

27. The Commission previously considered the environmental consequences of the activities contemplated by the Master Agreements in the decisions where the Commission granted CPCNs to the carriers that are parties to the Agreements. Consequently, there is no need to conduct further environmental review of the Master Agreements.

28. Approval of the Master Agreements should be conditioned on the carriers' compliance with (i) all environmental rules and regulations applicable to the equipment installed by the carriers pursuant to the Master Agreements, and (ii) any new environmental regulations that the Commission adopts in Rulemaking 00-02-003 to the extent these new regulations are applicable to the carriers' equipment installed under the Master Agreements.

29. The Master Agreements do not circumvent § 851 or CEQA.

30. All revenues that PG&E receives from the Master Agreements should be credited to PG&E's electric ratepayers.

31. The following order should be effective immediately so that its provisions may be implemented expeditiously.

**I N T E R I M   O R D E R****IT IS ORDERED** that:

1. Pacific Gas and Electric Company (PG&E) is authorized pursuant to Pub. Util. Code § 851 to convert nine of the 13 Master Agreements appended to Application (A.) 00-12-026 into lease agreements. The nine Agreements addressed by this Order are between PG&E and the following parties:  
(i) Advanced TelCom Group, Inc., (ii) Brooks Fiber Communications of Bakersfield, Inc., (iii) Brooks Fiber Communications of Fresno, Inc., (iv) Brooks Fiber Communications of San Jose, Inc., (v) Brooks Fiber Communications of Stockton, Inc., (vi) Fiber Communications, Inc., (vii) Sprint Communications Company L.P., (viii) RCN Telecom Services, Inc., and (ix) Seren Innovations, Inc. These nine agreements are referred to hereafter as the "Master Agreements."
2. PG&E's authority granted by Ordering Paragraph 1 shall expire if not exercised within 60 days from the effective date of this Order.
3. Within 60 days from the effective date of this Order, PG&E shall file and serve written notice that identifies which Master Agreements have been converted into leases.
4. PG&E may make minor amendments to the Master Agreements as set forth in the Conclusions of Law. All other amendments are subject to prior review and approval by the Commission pursuant to § 851.
5. All revenues that PG&E receives from the Master Agreements shall be credited to PG&E's electric ratepayers.
6. PG&E shall offer third parties the opportunity to attach telecommunications equipment to PG&E's facilities pursuant to General Order 69-C license agreements like those contained in Advice Letter 2063-E. Any such

agreements shall not include fees associated with § 851, such as those fees described in Section 8.5 of the Master Agreements.

7. PG&E shall notify the Director of the Commission's Energy Division about the following matters pertaining to the Master Agreements: (i) a reduction or extension of the term of any Master Agreement, (ii) the termination of any Master Agreement, and (iii) substantive changes to plant-in-service or rights-of-way under any of the Master Agreements. All notifications shall be in writing, include a description of the sites involved, and be provided within 30 days of the event triggering the notice.

32. In future applications where PG&E seeks Commission approval of agreements that impose fees on third parties for the costs that PG&E incurs to comply with § 851, PG&E shall demonstrate that the fees and associated costs are reasonable.

8. The authority granted by this Order is conditioned on the carriers' compliance with (i) all environmental rules and regulations applicable to the equipment installed by the carriers pursuant to the Master Agreements, and (ii) any new environmental regulations that the Commission adopts in Rulemaking 00-02-003 to the extent these new regulations are applicable to the carriers' equipment installed under the Master Agreements.

9. Application 00-12-26 is granted to the extent set forth in the previous Ordering Paragraphs.

10. The protest of A.00-12-026 is denied.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.